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IN THE

Supreme Court of the United States

October Term, 1947

No. 583

JOSEPH PATERNO,

Petitioner,

against

JOHN A. LYONS, as Commissioner of Correction of the State of New York,

Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions of the Courts Below

The New York Court of Appeals rendered its unanimous decision of affirmance without opinion. Its memorandum decision is reported in 297 N. Y. 617. The opinion of the Appellate Division of the New York Supreme Court, also unanimous, is reported in 272 N. Y. App. Div. 120. The opinion of the Special Term of the New York Supreme Court is not reported, but is printed at pages 3-11 of the Record. The opinion of the Erie County Court is reported in 187 N. Y. Misc. 56.

Jurisdiction

This Court granted certiorari to the New York Court of Appeals on February 9, 1948, and ordered the case transferred to the appellate docket (R. 43). The basis for petitioner's petition for a writ of certiorari was a claim that the decision of the New York Court of Appeals deprived him of his liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Statement

The proceedings herein were commenced by respondent's application to a Special Term of the New York Supreme Court for an order prohibiting the County Judge of the County of Erie, New York, from granting an order vacating the judgment of conviction of the Erie County Court, entered on July 16, 1937 in an action entitled "*People of the State of New York* v. *Joseph Paterno*" (R. 12).

The Special Term of the Supreme Court granted the order of prohibition on the ground that the Erie County Court was without jurisdiction to grant the proposed order vacating its judgment (R. 2, 11), and this order of prohibition was unanimously affirmed by the Appellate Division of the New York Supreme Court (R. 32) and also by the New York Court of Appeals (R. 40).

Facts

On October 30, 1936 the Grand Jury of Erie County, New York, returned an indictment against petitioner Joseph Paterno, accusing him of the following crime (R. 16):

> "Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appro-

priated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously bought, received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop."

Petitioner was arraigned on November 10, 1936, was represented by counsel, and pleaded not guilty (R. 16). Subsequently, on April 14, 1937, petitioner again appeared in court, withdrew his former plea of not guilty, and pleaded guilty to the crime of attempted grand larceny, second degree (R. 16). That plea of guilty was accepted by the court upon the district attorney's written recommendation that petitioner "be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree" (R. 15, 17). On July 16, 1937, petitioner was sentenced to state prison for a term of 1 year, 3 months to 2 years, 6 months, execution of which was suspended and petitioner was placed upon probation (R. 15). He did not move for a stay of judgment nor did he appeal from the judgment of conviction. Petitioner was discharged from probation on December 1, 1938 and never actually served any portion of that sentence.

On November 17, 1941, petitioner was sentenced to state prison by the County Court of Chautauqua County, New York, upon his plea of guilty to the crime of robbery, second degree, under an indictment charging him with robbery, first degree. He was sentenced as a second felony offender to a term of not less than fifteen years nor more than thirty years. Petitioner's 1937 conviction in the Erie County Court of attempted grand larceny, second degree, was used as the basis for sentencing him as a second offender. Petitioner is still serving the sentence imposed by the Chautau-

qua County Court, which sentence, by its terms, has not yet expired (R. 13, 17).

On January 2, 1946, petitioner made a motion in the Erie County Court for an order vacating and setting aside his 1937 conviction in that Court (R. 13, 17). The contention urged by petitioner in support of his motion was that the Erie County Court erred in accepting a plea of guilty to the crime of attempted grand larceny, second degree, under an indictment charging him with criminally receiving stolen property. The Judge of the Erie County Court before whom this motion was made indicated in an opinion that he was about to grant petitioner's motion, but urged that he, as County Judge, be proceeded against by an application to the State Supreme Court for a writ of prohibition, in order that the appellate courts might have an opportunity to determine whether or not the Erie County Court had jurisdiction to grant petitioner's motion (R. 29). This procedure was followed, and, as pointed out above, the New York Court of Appeals held that the Erie County Court did not have such jurisdiction.

Prior to this motion to the Erie County Court, petitioner had instituted a proceeding in the Chautauqua County Court to vacate the judgment of conviction rendered by that Court in 1941, whereby petitioner was sentenced as a second offender. Petitioner based his motion upon a claim that the prior sentence by the Erie County Court was improper. The Chautauqua County Court denied petitioner's motion for resentence on the ground that it did not have jurisdiction to entertain such a collateral attack upon the judgment of the Erie County Court (*People* v. *Paterno*, 182 N. Y. Misc. 491) (R. 35-6).

Following this denial of his motion, petitioner sought to contest his incarceration by means of a writ of *habeas*

corpus, but the Appellate Division of the New York Supreme Court ordered that such writ of *habeas corpus* be dismissed on the ground that the remedy of *habeas corpus* was not available to correct the error complained of (*People ex rel. Paterno* v. *Martin*, 268 N. Y. App. Div. 956). The basis for the Appellate Division's decision was the case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, involving an identical situation, where the New York Court of Appeals held that in such cases as this *habeas corpus* was not a proper remedy (R. 35-6). Later petitioner again moved the County Court of Chautauqua County to vacate the judgment of conviction, and such motion again was denied (R. 36).

Summary of Argument

Although petitioner relies on the Fifth as well as the Fourteenth Amendment to the United States Constitution, this discussion is limited to an examination of petitioner's rights under the Fourteenth Amendment only, in view of the fact that the Fifth Amendment is a restriction on the Federal government only, and has no application to state action (*Hallinger* v. *Davis*, 146 U. S. 314, 319; *Jack* v. *Kansas*, 199 U. S. 372, 379-80).

Inasmuch as the New York Court of Appeals has never directly passed upon the legality of a plea of guilty to attempted grand larceny, second degree, under an indictment charging the crime of criminally receiving stolen property, we cannot concede that the acceptance of such a plea by the Erie County Court constituted error. However, in view of the dictum of the Court of Appeals in this respect, we shall assume for present purposes that the Erie County Court did err when it accepted petitioner's plea of guilty, and we shall also assume that such ruling would have constituted

reversible error had a timely appeal from the judgment of conviction been taken to the appellate courts. Carrying our position one step further, neither do we dispute the fact that the State does not now provide petitioner with any remedy whereby this allegedly erroneous ruling may be corrected.

These preliminary considerations herein thus having been disposed of, there remains for this Court's determination only the question of whether the State must provide petitioner with a remedy at this time in order to satisfy the requirements of the due process clause of the Fourteenth Amendment.

It is our position that no corrective remedy by means of a collateral proceeding need now be supplied by the State to correct an allegedly erroneous ruling of law by a State court, where such error did not operate to deprive petitioner of any right guaranteed to him by the United States Constitution. We further urge that inasmuch as the Erie County Court had properly acquired jurisdiction over petitioner and had general jurisdiction of the crime with which he was charged, and in view of the fact that all other requisites of due process were carefully observed throughout the entire proceeding, the acceptance by that Court of petitioner's plea of guilty, although such ruling may have been erroneous, did not deprive petitioner of any Federal constitutional right. Ample means to correct any error which may have been made by the trial court were available to petitioner at the time of his conviction in 1937. By not taking advantage of these remedies at that time, petitioner should be deemed to have waived the alleged error of which he complains here.

Petitioner requested and received a favor from the Erie County Court by its acceptance of his plea of guilty to a reduced charge. Petitioner should not now be permitted to attack the judgment rendered at his request.

POINT I

No corrective remedy by means of a collateral proceeding need be supplied by the State to correct an allegedly erroneous ruling of law by a state court where the error complained of did not operate to deprive petitioner of any right guaranteed to him by the United States Constitution.

By way of preface to the ensuing argument, we urge that this Court should take cognizance of the fact that the contention set forth in petitioner's main argument, on pages 4-5 of his brief, to the effect that petitioner was denied certain rights in violation of the New York State Constitution, is inapposite. This Court has repeatedly acknowledged its lack of jurisdiction to review a state court's interpretation of the provisions of a state constitution. In the case of *People ex rel. Wachowicz* v. *Martin, supra,* 293 N. Y. 361, the New York Court of Appeals held that the procedure followed in that case, which was the same as in the case at bar, satisfied the requirement of Article I, Section 6, of the New York Constitution that infamous crimes be prosecuted by indictment of a grand jury.

We further submit that petitioner is likewise precluded from arguing in this Court that the Erie County Court has inherent power to set aside petitioner's judgment of conviction (*Cf.* Petr's. Br. pp. 7-10). The New York Court of Appeals below expressly held that under New York practice the County Court did not have such power. This ruling by the highest State court on a question of State procedure should be deemed binding on this Court (*Moss* v. *Ramey,* 239 U. S. 538; *Fielden* v. *Illinois,* 143 U. S. 452).

Adequate remedies now exist in New York State whereby any person convicted, or deprived of his liberty, in violation of the provisions of the United States Constitution

may collaterally attack such conviction or incarceration. Relief by means of a writ of *habeas corpus* is available where the sentencing court did not have jurisdiction either over the person of the defendant, or general jurisdiction over the offense with which he was charged (New York Civil Practice Act § 1231). And, as a result of judicial decisions, even in those cases where the court did have jurisdiction, the common law writ of *coram nobis* has been held to be available to vacate a judgment of conviction procured by fraud *dehors* the record. (*Morhous* v. *Supreme Court*, 293 N. Y. 131; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Lyons* v. *Goldstein*, 290 N. Y. 19). Therefore, in those instances where a sentencing court never properly acquired jurisdiction or where it was divested of its jurisdiction because of the subsequent infringement of a defendant's constitutional right, relief may be had by the utilization of these collateral remedies. It is respectfully submitted that the existence of these remedies constitutes an adequate system whereby any person convicted or incarcerated in New York State in violation of his constitutional rights may secure his release from confinement.

In the case at bar petitioner cannot take advantage of any of these remedies because he has never been deprived of any right guaranteed to him by the United States Constitution. Petitioner complains that a State court made an erroneous ruling on a question of law, and there is no remedy now available to correct that error. But, unless that alleged error infringed upon petitioner's constitutional rights so as to divest the sentencing court of jurisdiction, no collateral remedy need be supplied by this State at the present time. In this respect the New York Court of Appeals has held that even if the ruling of the trial court herein accepting petitioner's plea of guilty be deemed to

have been erroneous, that error did not have the effect of divesting the trial court of jurisdiction so as to make relief by *habeas corpus* available; and, inasmuch as the error was one of law and not one of fact, the Court of Appeals also held that *coram nobis* did not lie.

Viewing this case in the light of the foregoing discussion, we find that even though an error of law may have been made by the sentencing court, it was not such an error as would have the effect of nullifying that court's judgment by divesting the court of jurisdiction; therefore the State need not supply petitioner with a collateral remedy.

The Fourteenth Amendment to the United States Constitution does not guarantee that the decisions of the state courts shall be free from error not affecting constitutional rights. This Court has consistently held that a writ of *habeas corpus* is not available to correct an error of law made by a court exercising competent jurisdiction over the person of the petitioner and over the crime with which he was charged. By so holding, this Court has recognized the fact that a judgment of a court of competent jurisdiction is not rendered a nullity merely because an error of law was made somewhere in the course of the proceeding. And by the denial of relief in these cases by the use of a writ of *habeas corpus* in the federal courts, where the scope of the writ is broader than in most states, the effect of these decisions of this Court has been to leave the petitioner in each case remediless, no collateral remedy being necessary to satisfy due process inasmuch as there had been no violation of any constitutional right. In the case of *Frank* v. *Mangum*, 237 U. S. 309, this Court stated (p. 326):

"Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. *Ex parte Parks*, 93 U. S. 18, 21; *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Royall*, 117 U. S. 241, 250; *In re Frederich, Pet'r*, 149 U. S. 70, 75; *Baker* v. *Grice*, 169 U. S. 284, 290; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184."

This doctrine was summarized as follows in the case of *In re Converse*, 137 U. S. 624, where, in denying a writ of *habeas corpus*, this Court remarked as follows (p. 631):

"It is not our province to inquire whether the conclusion reached and announced by the [State] Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.

"The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretence of an abridgement of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

To the same effect see:

Worcester County Co. v. *Riley*, 302 U. S. 292, 299;
Central Land Co. v. *Laidley*, 159 U. S. 103, 112;
Jones v. *Buffalo Creek Coal Co.*, 245 U. S. 328, 329.

The recent case of *Sunal* v. *Large*, 332 U. S. 174, furnishes further recognition of the fact that a person may be without any remedy to correct a concededly erroneous rul-

ing made by a trial court, even where there would have been no conviction had the error not been made. In the *Sunal* case the trial court had erroneously refused to permit the defendants to attack a classification which had been made by the Selective Service Board, the court holding that the Board's classification was not subject to judicial review. The defendants did not appeal, but subsequently, in reviewing another case, this Court held that such classifications were reviewable. Nevertheless, the defendants' writs of *habeas corpus* were dismissed by this Court on the ground that *habeas corpus* may not be used to correct "errors in trial procedure which do not cross the jurisdictional line" (p. 179). Continuing, this Court pointed out (p. 182):

> "Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court. • • • Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process."

See also:

Johnson v. *Zerbst*, 304 U. S. 458, 465.

Erroneous rulings by a trial court on questions of law may be corrected by resort to the particular modes of direct review procedure which are provided for by law. If a person does not avail himself of those opportunities, he should not be heard to complain at some later date.

POINT II

The Erie County Court's acceptance of petitioner's plea of guilty to the crime of attempted larceny, under an indictment charging him with criminally receiving stolen property, did not deprive petitioner of due process of law.

A. The Erie County Court had jurisdiction over petitioner's person and over the offense with which he was charged.

Petitioner does not question the fact that the indictment returned against him by the Grand Jury of Erie County on October 30, 1936, accusing him of the crime of criminally receiving stolen property, was valid in every respect. Petitioner also admits that he was duly arraigned under that indictment and was represented by competent counsel. There can be no doubt that at this point the Erie County Court had properly acquired jurisdiction over the person of petitioner. That Court also had jurisdiction over the crime with which petitioner was charged (as well as the crime to which he subsequently pleaded guilty), for Section 39, subdivision 2, of the New York Code of Criminal Procedure vests the Erie County Court with jurisdiction to try and determine indictments for all crimes.

In the course of this valid pending judicial proceeding the Court was called upon to decide the question of law whether the commission of the crime of attempted grand larceny, second degree, was "necessarily included" in the crime with which petitioner was charged in the indictment, thereby permitting a conviction for the lesser offense, as provided for by Section 445 of the New York Code of Criminal Procedure. If, in deciding that question of law, the court reached an erroneous conclusion, that error did not affect

the jurisdiction previously acquired. Petitioner could have had such ruling reviewed and corrected by the State appellate courts, had he so desired. It is another matter entirely for him to claim that this particular error, which did not affect his constitutional rights, vitiated the entire proceeding.*

B. The indictment under which petitioner's plea of guilty was accepted, and the court's acceptance of such plea, complied with the requirements of the due process clause.

The indictment accusing petitioner of criminally receiving stolen property vested the court with jurisdiction to accept a plea of guilty to attempted grand larceny, notwithstanding the fact that by doing so the court may have committed an error. The case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, referred to *supra*, pages 5, 7, involved a set of facts almost identical with those of the present case. In handing down the opinion of the New York Court of Appeals in that case, the late Chief Judge Lehman drew an analogy between the infirmity inherent in a judgment based upon a verdict or plea where, as here, the indictment fails to state facts sufficient to constitute the *particular* crime of which the defendant has been found guilty, and the infirmity inherent in a judgment based upon a verdict or plea where the indictment fails to state facts sufficient to constitute *any* crime. He pointed out that in both cases there is a valid accusation pending against the defendant, charging him with the commission of a crime; in both cases the court has jurisdiction of the person of the defendant

* That the determination of this question of law was not free from all doubt is indicated by the fact that Section 1308 of the New York Penal Law, designating receiving stolen property as a crime, is contained in Article 122 of the Penal Law which deals with "Larceny."

and general jurisdiction of the crime; and likewise in both cases it is within the court's jurisdiction to determine whether or not the indictment sufficiently charges that crime.

There have been numerous cases before this Court where persons who had been duly convicted and incarcerated sought their release by writs of *habeas corpus* upon the contention that inasmuch as the indictments under which they had been convicted did not state facts sufficient to constitute any crime, the sentencing courts could not have acquired jurisdiction to sentence them for crimes not specifically set forth in the indictments. In every one of such cases this Court dismissed the writ of *habeas corpus* on the ground that the question of the sufficiency of an indictment to charge the crime for which there was a conviction, may not be reviewed by means of a collateral attack. The basic reason for the adoption of this rule is a sound one, for, as was enunciated by this Court in *Knewel* v. *Egan*, 268 U. S. 442, 446:

> "It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings. *Ex parte Watkins*, 3 Peters 193; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Parks, supra; In re Coy, supra; Bergemann* v. *Backer, supra; Howard* v. *Fleming*, 191 U. S. 126 *Dimmick* v. *Tompkins*, 194 U. S. 540; *In re Eckart*, 166 U. S. 481; *Goto* v. *Lane*, 265 U. S. 393."

The case of *Goto* v. *Lane*, 265 U. S. 393, cited in the *Knewel* case, also dealt with a contention, raised by a writ of *habeas corpus*, that the indictment did not charge a crime. There, too, this Court stated (p. 402):

"The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency and the effect to be given to the stipulation were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not for that reason void, *Ex parte Watkins*, 3 Pet. 193, 203; *Ex parte Parks*, 93 U. S. 18, 20; *Ex parte Yarbrough*, 110 U. S. 651, 654, but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. *Markuson* v. *Boucher*, 175 U. S. 184. And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute. *Riddle* v. *Dyche*, 262 U. S. 333. And see *Craig* v. *Hecht*, 263 U. S. 255."

The decisions of this Court have been unambiguous and uniform, and in every instance it has been held that the question of the sufficiency of an indictment to set forth the crime of which the accused is convicted is a matter solely for the determination of the trial court, reviewable only by direct appeal, not by collateral proceedings. (*Dimmick* v. *Tompkins*, 194 U. S. 540, 551-2; *Howard* v. *Fleming*, 191 U. S. 126, 135; *In re Eckart*, 166 U. S. 481, 482-3; *Ex parte Yarbrough*, 110 U. S. 651, 653-4; *Ex parte Parks*, 93 U. S. 18, 20; *Ex parte Watkins*, 3 Pet. 193, 203, 206; *In re Coy*, 127 U. S. 731; *Bergemann* v. *Backer*, 157 U. S. 655.)

Although, as we have shown above, the indictment herein was in proper form and vested the trial court with competent jurisdiction, it should be borne in mind that an indictment by a grand jury is not essential for due process (*Hur-*

tado v. *California*, 110 U. S. 516; *Frank* v. *Mangum, supra*, 237 U. S. 309; *Dowdell* v. *United States*, 221 U. S. 325). Due process is satisfied when an accused has been notified of an accusation pending against him and has been given an adequate opportunity to defend himself (*Garland* v. *Washington*, 232 U. S. 642, 645; *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Frank* v. *Mangum, supra*).

In the case at bar, the indictment found against petitioner by the Erie County Grand Jury informed him that there was an accusation pending against him. He was given every opportunity to defend himself against that charge, and he had the assistance of competent counsel to aid him in his defense. Under these circumstances, petitioner requested that he be permitted, and he was permitted, to plead guilty to a lesser charge which he, the district attorney and the court all assumed to be within the purview of the indictment. Simply because that assumption may have been erroneous does not detract from the fact that petitioner, knowing the crime with which he was being charged, of his own volition admitted that he was guilty of the commission of that crime. If petitioner had denied his guilt, he would have been accorded a proper hearing under the law and an opportunity to show his innocence. By pleading guilty to attempted grand larceny, second degree, with the advice of counsel, petitioner admitted that he knew the precise nature of the charge against him and, being guilty thereof, he wished to forego his right to be tried under that accusation.

POINT III

Petitioner requested and received a favor from the Erie County Court by its acceptance of his plea of guilty to a reduced charge; petitioner should not now be permitted to attack this judgment rendered at his request.

At the time of petitioner's conviction in 1937 there were suitable remedies available to him whereby the alleged error of the Erie County Court could have been corrected. Inasmuch as petitioner did not avail himself of any of these methods for procuring relief, it does not seem unreasonable to assume that petitioner was entirely satisfied with the judgment rendered by the court and did not desire to have it set aside or to impeach it in any way. We contend that petitioner's request for, and acquiescence in, the erroneous ruling of the court constituted a waiver of such error so as to preclude him from now asserting that issue.

In the first place, following petitioner's conviction in the Erie County Court, he could have appealed as of right from the judgment of conviction, and the error complained of could then have been reviewed and corrected by the appellate courts. The New York Code of Criminal Procedure governs the practice in criminal cases in New York State (*People* v. *Gersewitz*, 294 N. Y. 163). In 1937, as at the present time, Sections 515-520 of the New York Code of Criminal Procedure expressly provided that a defendant could appeal "from the judgment on a conviction after indictment" (§ 517), and that every person "convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal" (§ 520). The statement to the contrary on page 6 of petitioner's brief is unfounded. The case of *Lyons* v. *Goldstein, supra*, cited by petitioner, con-

tains no discussion whatever regarding the right of appeal from a judgment of conviction entered on a plea of guilty. Nor is the case of *People* v. *Wright*, 263 N. Y. App. Div. 1020, also cited by petitioner, applicable, for the appeal there had been taken from an order denying a motion to reopen and set aside a judgment of conviction on the ground of newly discovered evidence; it had nothing to do with the question of a direct appeal from a judgment of conviction. Furthermore, the majority opinion of the New York Court of Appeals in the *Wachowicz* case (as distinguished from its dissenting opinion cited by petitioner) recognized the fact that the right of appeal is available even though the judgment of conviction is entered on a plea of guilty (293 N. Y. 361, at page 366). Petitioner never took any such appeal and, so far as the record shows, he never expressed any intention of doing so; his time to appeal has long since expired.

Petitioner could also have moved to withdraw his plea of guilty pursuant to Section 337 of the New York Code of Criminal Procedure, in effect in 1937, which provides that the court "may in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted." If this motion to withdraw were improperly denied and judgment entered, an appeal could have been taken from the judgment of conviction, and upon such appeal, the intermediate order denying the application to withdraw the plea of guilty could have been reviewed (N. Y. Code of Criminal Procedure § 517; *cf. Canizio* v. *New York*, 327 U. S. 82, 86; *People ex rel. Wachowicz* v. *Martin*, *supra*, 293 N. Y. 361, 366).

Another procedure which was open to petitioner was to move in arrest of judgment after his plea of guilty, on the ground that the facts stated in the indictment did not constitute a crime (N. Y. Code of Criminal Procedure § 467).

An improper denial of that motion likewise could have been reviewed on appeal (N. Y. Code of Criminal Procedure § 517; *People ex rel. Wachowicz* v. *Martin, supra*). A complete answer to petitioner's claim that this mode of review was not available to him is found in the opinion of the New York Court of Appeals in *People ex rel. Prince* v. *Brophy*, 273 N. Y. 90. There, too, the judgment of conviction had been entered upon relator's plea of guilty to the indictment, and six years thereafter he sought to have it set aside by *habeas corpus* on the ground that the indictment was insufficient to charge the crime to which he pleaded guilty. The Court dismissed the writ of *habeas corpus*, pointing out on page 96:

> "The defendant asked in the midst of his trial that the court accept from him a plea of larceny in the second degree instead of continuing his case for robbery in the first degree, a much more serious charge. The plea was accepted. *The defendant could have moved in arrest of judgment alleging the insufficiency of this indictment to cover the larceny in the second degree, but he did not do so.*" (Emphasis supplied.)

The case at bar is entirely different from the case of *Marino* v. *Ragen*, 332 U. S. 561, cited on page 7 of petitioner's brief. There the State of Illinois admitted that Marino had been deprived of his constitutional rights and the facts showed that Marino had not been able to procure relief because of the "Illinois procedural labyrinth." In the present case, the aforementioned New York State procedural remedies were clearly provided for by statute but petitioner never even attempted to make use of any of them. He never asked for a review of the ruling of law, and therefore, he never obtained any review; but that does not detract from the fact that suitable relief was made available to him.

Had petitioner availed himself of any one of the foregoing remedies, he could have had the alleged error of the trial court corrected. Apparently the reason why he did not do so was that he recognized that he was receiving clemency from the Erie County Court by being given only a one to two year suspended sentence on probation, as compared with a possible ten year sentence to be served in state prison and a $1,000 fine, if he were found guilty of the crime of criminally receiving stolen property for which he had been indicted. Having already received one favor from the court, petitioner should not be permitted to burn his candle at both ends by being allowed to repudiate that favor whenever it happens to suit his convenience.

This Court's opinion in the case of *Parker v. Illinois*, 333 U. S. , decided on April 5 of this year, appropriately illustrates the principle of waiver which is applicable here. Speaking for the Court in the *Parker* case, Mr. Justice Douglas stated:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara*, 266 U. S. 314; *Central Union Co.* v. *Edwardsville, supra.* The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U. S., pp. 194-195. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the

way to this Court was not only clearly marked, it was also open and unobstructed."

Similarly in the case at bar, three clearly marked, unobstructed channels were provided to petitioner by New York State in 1937, whereby petitioner could have raised the issue he now relies upon. These three remedial channels, which were not blocked by any "hypertechnical procedural obstructions,"* gave petitioner "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the State courts. Analogously, when petitioner chose to abandon his privilege of having the ruling reviewed, he waived for all time his right to do so.

The same reasoning was applied by this Court in *Canizio v. New York, supra,* 327 U. S. 82, involving a claim by Canizio that he had been denied the benefit of counsel prior to his conviction, in deprivation of his constitutional rights. The records showed that although Canizio did not have counsel when he was arraigned, he was represented by counsel prior to and at the time of his sentence. Upon these facts it was held that Canizio actually had had the benefit of counsel and that when that counsel took over the defendant's case, he could then have raised the question of a defect in the earlier part of the proceedings. "Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel" (p. 87). Accordingly, petitioner's failure in the present case to raise the question of the alleged error at the time when the various State statutes afforded him that opportunity, should now preclude him from relying upon that alleged error as a basis for relief.

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* *Cf.* dissenting opinion of Mr. Justice Rutledge in *Parker v. Illinois, supra.*

Subsequently, in the case of *Gayes* v. *New York*, 332 U. S. 145, this Court referred with approval to the *Canizio* case, stating (p. 148):

> "We there held that whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand."

As discussed above, before sentence was imposed in the present case, petitioner had been afforded ample opportunity to resolve any doubts which might have arisen from the circumstances of his plea of guilty.

Another case in point involving waiver was *Yakus* v. *United States*, 321 U. S. 414, which dealt with a criminal prosecution in Federal district court for violation of a regulation promulgated pursuant to the Emergency Price Control Act of 1942. In this prosecution the defendant sought to raise the defense that the regulation was arbitrary and unreasonable, thereby depriving him of property without due process of law in violation of the Fifth Amendment to the United States Constitution. Although the Price Control Act specifically provided a procedure whereby the validity of any regulation could be determined by a proceeding in the Emergency Court of Appeals, the defendant had not availed himself of such method of review. This Court held that the defendant's failure to abide by the statutory procedure for review constituted a waiver of his right to raise that constitutional question, stating (pp. 444-5):

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil* v. *Vermont*, 144 U. S. 323, 331; *Barbour* v. *Georgia*, 249 U. S. 454, 460;

Whitney v. *California*, 274 U. S. 357, 360, 362, 380. • • • While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts."

Conclusion

In the proceedings in the Erie County Court in 1937, petitioner had been properly held to answer for the crime charged in the indictment. He sought and obtained the benefit that might accrue to him from a finding of guilt of a crime connected with the same transaction, though perhaps not necessarily included in the crime charged in the indictment. Of all the persons in the courtroom at the time of his plea, petitioner best knew whether or not he was guilty of the crime to which he pleaded, which crime grew out of the circumstances of the crime for which he was indicted. He chose to say that he was an actor in the crime which was the subject of the indictment, at least to the extent of having committed attempted grand larceny, second degree. The ruling of the Erie County Court on the question of law in no way infringed upon any right guaranteed to petitioner by the United States Constitution. Any error in that ruling could have been corrected by the use of various remedies which the State made available to petitioner but he decided not to take advantage of them. The Erie County Court had jurisdiction to determine whether in the particular circumstances surrounding the plea in this case it was authorized to render a judgment which it certainly was authorized to render in some circumstances. Its judgment, though possibly erroneous, was not a nullity, and petitioner, who asked the court to render that judgment in a valid pending judicial proceeding, should not now be permitted to repudiate that judgment ten years later when it suits his convenience.

The judgment of the New York Court of Appeals should be affirmed.

Dated: April 19, 1948.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 583.—October Term, 1947.

Joseph Paterno, Petitioner, v. John A. Lyons, as Commissioner of Correction of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 1, 1948.]

Mr. Justice Black delivered the opinion of the Court.

October 30, 1936, the petitioner was indicted in the County Court of Erie County, New York, on a charge of

> "Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously brought, received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop."

The punishments provided for this offense and for larceny are substantially the same. Both may, according to circumstances, range up to ten years at hard labor.[1] November 10, 1936, petitioner appeared in court with counsel, pleaded not guilty to the indictment, and was released on a bond of $2500. Five months later, on April 14, 1937, he again appeared in Erie County Court and upon agreement with the district attorney was "permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree." Under New York law the punishment for

[1] N. Y. Penal Law §§ 1294, 1297, 1308.

such an attempt can be no more than half the punishment provided for the offense attempted.[2] The sentence, not imposed until July 16, three months after the plea of guilty, was for fifteen months minimum and thirty months maximum at hard labor. This sentence was suspended and petitioner was placed on probation with a requirement that he "make restitution of $75.00 cash balance as determined by probation dept."

Although discharged from probation December 1, 1938, petitioner on December 27, 1945, made a motion in the nature of *coram nobis* in the Erie County Court asking that court to vacate and set aside its former conviction of petitioner, permit withdrawal of the plea of guilty, and for leave to plead *de novo*. There was a special reason why petitioner wished to vacate this judgment long after the probationary restraints of the sentence had been lifted. In the meantime he had pleaded guilty in the Chautauqua County Court, New York, to the crime of robbery second degree under an indictment charging him with robbery first degree. In accordance with the requirements of the New York second felony offender law[3] the Chautauqua County judge had sentenced petitioner to 15 to 30 years at hard labor, proof having been made before him of petitioner's prior Erie County conviction for attempted grand larceny second degree.

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[2] N. Y. Penal Law § 261. Maximum punishment for grand larceny, second degree is 5 years. N. Y. Penal Law § 297. The District Attorney explained his reasons for the agreement in these words: "Only a very small portion of the stolen property was recovered and that was found in the possession of several admitted inmates of a disorderly house who are of necessity the chief witnesses for the People in this case. For these reasons and because of the character of these witnesses, it is recommended that the defendant be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree."

[3] N. Y. Penal Law § 1941.

The grounds of the motion in the nature of *coram nobis* were that the Erie County Court had exceeded its power in accepting his plea of guilty to the offense of attempted grand larceny second degree under the indictment which charged him with the offense of receiving, concealing, and withholding property knowing it to have been stolen. He alleged that judgment of conviction in a case initiated by an indictment which did not include the charge to which he had pleaded guilty denied him his right under Art. 1, § 6 of the New York Constitution to be prosecuted for an infamous crime only by indictment of a grand jury,[4] and also denied him due process of law guaranteed by the Fourteenth Amendment.[5] The judge of the Erie County Court was of opinion that acceptance of the plea of guilty to the lesser offense deprived him of rights guaranteed by the New York Constitution and that therefore his conviction was without due process of law. 187 Misc. 56, 60 N. Y. S. 2d 813. That judge was prevented from vacating the judgment, however, by a writ of prohibition issued upon the application

[4] "No person shall be held to answer for a capital or other infamous crime unless on indictment of a grand jury. . . ." N. Y. Const., Art. 1, § 6.

[5] These questions had previously been raised by petitioner in other New York courts without success. In 1943 he had moved the Chautauqua County Court to vacate its judgment, under which he had been sentenced as a second felony offender. That Court held it was without power to pass upon the validity of the Erie County judgment and dismissed his motion. *People* v. *Paterno*, 182 Misc. 491, 50 N. Y. S. 2d 713. In another proceeding the Appellate Division of the New York Supreme Court, relying on *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, held that habeas corpus was not available to obtain vacation of the judgment, and that the only way to raise a question as to whether a plea of guilty to attempted larceny could be accepted under an indictment such as that against Paterno was by appeal or motion in arrest of judgment. *People ex rel. Paterno* v. *Martin*, 268 App. Div. 956, 51 N. Y. S. 2d 679.

of the State by the Supreme Court of Erie County. That court held that Paterno had "been denied no constitutional or legal right." The Fourth Department of the Supreme Court, Appellate Division, affirmed, 272 App. Div. 120, 69 N. Y. S. 2d 715. Stating that acceptance of Paterno's plea to the lesser offense might have been an error of law which would have justified relief by motion in arrest of judgment or by appeal as of right; but that petitioner, having declined to avail himself of these remedies within the statutory period, could not later raise the question.* It failed to accept Paterno's claim that the circumstances under which his plea was entered deprived him of due process of law. The New York Court of Appeals affirmed without opinion. 297 N. Y. 617, 75 N. E. 2d 630. We granted certiorari. 333 U. S. —.

It is again contended here that acceptance of petitioner's plea of guilty to attempted grand larceny second degree under an indictment which charged that he had bought, received, concealed, and withheld stolen property deprived him of his right under the New York Constitution to be prosecuted for an infamous crime only by a grand jury indictment and that consequently the Erie County judgment of conviction is a nullity. But this contention as to New York law has previously been rejected by the State's highest court, in *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, and was again rejected by the New York courts in this case. Their decision on such a state question is final here. *In re Duncan*, 139 U. S. 449, 462; *West* v. *Louisiana*, 194 U. S. 258, 261.

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* The State argues here that while petitioner had a right to appeal and challenge acceptance of the plea of guilty under the circumstances shown, neither *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, nor any other New York Court of Appeals case has squarely held that the trial court's action would have constituted reversible error.

Petitioner next argues that the State has failed to supply him an available remedy to attack the judgment against him and that such a failure denies him due process of law guaranteed by the Fourteenth Amendment. See *Mooney* v. *Holahan*, 294 U. S. 103, 113. But this contention falls with its premise. Petitioner, within the periods prescribed by New York statutes, could have challenged any alleged errors of state law either by filing a motion to withdraw his plea of guilty, or a motion in arrest of judgment, or by taking a direct appeal from the original judgment.[1] Certainly in the absence of any showing that petitioner was without an opportunity effectively to take advantage of these corrective remedies to challenge purely state questions such remedies are adequate from a due process standpoint. See *Parker* v. *Illinois*, 333 U. S. 571; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 169, and cases cited n. 6.

Petitioner further challenges the judgment as a denial of due process upon the ground that the indictment charged him with one offense and that the judgment was based on a plea of guilty to an entirely separate offense. This challenge again basically rests on the allegation that under New York law an indictment for receiving stolen property does not necessarily include a charge of an attempt to steal the property. Petitioner's motion to vacate on such a federal constitutional ground appears to be an

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[1] N. Y. Code Crim. Proc. §§ 337, 467, 469, 517, 519–521; N. Y. Laws 1946, c. 942; N. Y. Laws 1947, c. 706; *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 68 N. E. 2d 849; *Matter of Hogan* v. *N. Y. Supreme Court*, 295 N. Y. 92, 65 N. E. 2d 181; *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53; *People* v. *Gersewitz*, 294 N. Y. 163, 61 N. E. 2d 47; *Matter of Morhous* v. *N. Y. Supreme Court*, 293 N. Y. 131, 56 N. E. 2d 79; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19, 47 N. E. 2d 425; see *Canizio* v. *New York*, 327 U. S. 82, 84–85.

available procedure under New York law,[8] and the courts below so assumed. Determination of this federal due process question does not depend upon whether as a matter of New York law the Erie County judge erred in permitting petitioner to plead guilty.[9] The question turns rather upon whether the petitioner under the circumstances here disclosed was given reasonable notice and information of the specific charge against him and a fair hearing in open court. *In re Oliver*, 333 U. S. 257, 273, 278; *Cole* v. *Arkansas*, 333 U. S. 196, 201. We agree with the New York courts that this petitioner had such notice and information. The fairness of the hearing afforded petitioner is not challenged.

There is close kinship between the offense of larceny and that of receiving stolen property knowing that it was stolen. When related to the same stolen goods, as here, the two crimes certainly may fairly be said to be "connected with the same transaction" as the New York Court of Appeals noted in the *Wachowicz* case. 293 N. Y. at 367, 57 N. E. 2d at 56. A person commits larceny under New York law if he "unlawfully obtains or appropriates" an article, N. Y. Penal Law § 1294; he violates the receiving of stolen property statute if he "in any way . . . conceals, withholds, or aids in concealing or withholding . . . property, knowing the same to have been stolen or appropriated in such manner as to constitute larceny," N. Y. Penal Law § 1308. The overlapping nature of the two offenses is further emphasized by the definition of larceny in § 1290, which includes conduct whereby any person who "with intent to deprive or defraud another of the use and benefit of his property, or to appropriate the same to the use of any person other than the true owner,

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[8] See cases cited note 7; Fuld, The Writ of Error Coram Nobis, 117 N. Y. L. J. 2212, 2230, 2248.

[9] See *Caldwell* v. *Texas*, 137 U. S. 692, 698; *In re Converse*, 137 U. S. 624, 631; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Davis* v. *Texas*, 139 U. S. 651; *Howard* v. *Kentucky*, 200 U. S. 164, 173.

wrongfully takes, obtains or withholds [any property] by any means whatever, from the possession of the true owner or of any other person. . . ."

It would be exaltation of technical precision to an unwarranted degree to say that the indictment here did not inform petitioner that he was charged with substantial elements of the crime of larceny thereby enabling him, as a means of cutting his sentence in half, to agree to plead guilty of an attempted larceny. Procedural requirements are essential constitutional safeguards in our system of criminal law. These safeguards should constantly and vigilantly be observed to afford those accused of crime every fair opportunity to defend themselves. This petitioner had such opportunity. Months after his first appearance in court he came back and pleaded guilty to an attempt wrongfully to "withhold" the very property of another which the indictment had originally charged him with wrongfully "withholding."[10] It would be a strained interpretation of petitioner's constitutional rights to hold that under these circumstances he was not given sufficient notice of the charge against him to afford a basis for an intelligent decision to plead guilty to a related but lesser offense than that specifically described in the indictment. The due process clause of the Federal Constitution requires no such holding.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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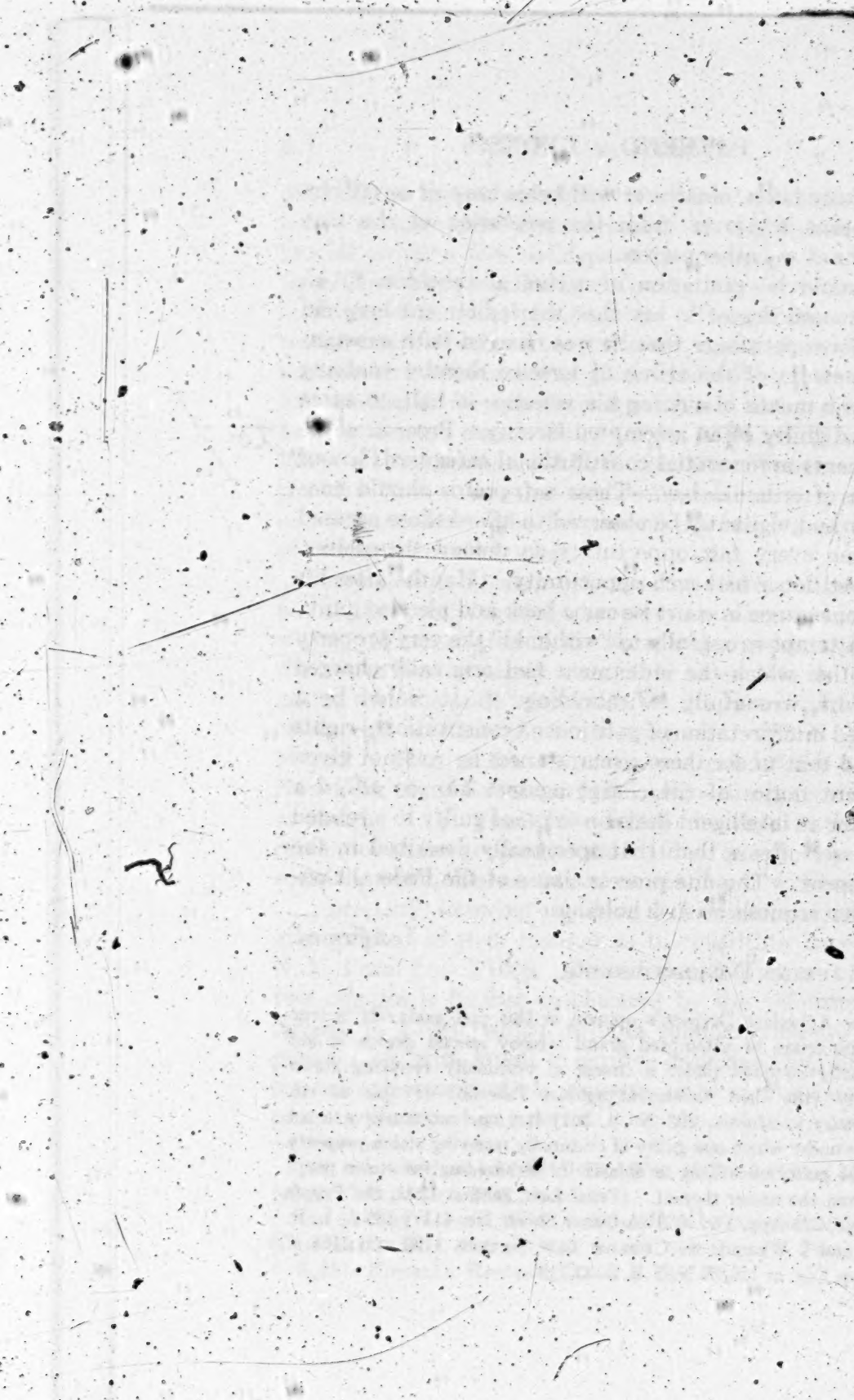
[10] The Appellate Division's opinion in this case said: "It is true that the crime of attempted grand larceny second degree is not necessarily included under a charge of criminally receiving stolen property (the then indictment against Paterno) (*People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361) but one can conceive a set of facts under which one guilty of criminally receiving stolen property could be guilty of larceny in unlawfully withholding the stolen property from the owner thereof. (Penal Law, Section 1290; See *People* v. *Vitolo*, 271 App. Div. 959 (Advance Sheets No. 411); 136 A. L. R. 1091; and 2 Wharton on Criminal Law, Sections 1122 and 1168.)" 272 App. Div. at 126, 69 N. Y. S. 2d at 719.



SUPREME COURT OF THE UNITED STATES

No. 583.—October Term, 1947.

Joseph Paterno, Petitioner, v. John A. Lyons, as Commissioner of Correction of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 1, 1948.]

Mr. Justice Frankfurter, concurring.

The New York Constitution requires that prosecution for an "infamous crime" be upon indictment by grand jury. The New York Court of Appeals has held that this constitutional requirement does not nullify the acceptance by a trial court of a plea of guilty to the offense of attempted grand larceny, second degree, upon an indictment for knowingly receiving stolen goods. Since, so far as the United States Constitution is concerned, the States may dispense with accusations by grand juries, it is for New York and not for us to decide when the procedural requirements of New York law, not touching those fundamental safeguards which the United States Constitution protects, are satisfied. What is here challenged is New York's determination that the knowing receipt of stolen goods is sufficiently related to larceny so as to permit acceptance of a plea of guilty of the latter on the assumption that an indictment for one affords adequate notice of the other. Surely this does not rise to the dignity of a substantial federal question. In the early days of the Fourteenth Amendment, this Court deemed it appropriate to remind that that Amendment had not made this Court

an appellate tribunal to supervise the administration of the criminal law of the States. It is not irrelevant to recall this admonition

Thus, I agree with the Court's opinion, but draw from it the conclusion that the writ of certiorari should be dismissed for want of a substantial federal question.